UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

ACADEMY THEATRICAL LIGHTING, INC.

Employer

and Case 20-RC-17596

THEATRICAL STAGE EMPLOYEES, LOCAL 16, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURES TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA[1]

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is a California corporation with a place of business in Santa Rosa, California, where it is engaged in the business of installing, operating and removing audio/visual and theatrical lighting. The parties further

[1] The Petitioner's name appears as described in its collective-bargaining agreement with the Employer.

stipulated, and I find, that during the calendar year ending December 31, 2000, the Employer sold goods and services valued in excess of $50,000 to Meadowood Resort, an enterprise within the State of California which meets the Board's standards for the assertion of jurisdiction on a direct basis. Based on the parties' stipulation to such facts, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The record reflects that the Employer and the Petitioner have had a collective bargaining relationship since 1993, and they are currently parties to an agreement that is effective from March 1, 1998, to February 28, 2003, (herein called the Agreement) covering "stagehand employees," who are engaged in "the installation/operation/removal of all theatrical equipment to be used for the purpose of entertainment." It is undisputed that the custom and practice of the parties has been to apply the terms of this and previous collective-bargaining agreements only to on-call employees dispatched by the Petitioner. During the year preceding the hearing in this case, the Petitioner dispatched approximately 50 employees who performed audio visual, sound and lighting work for the Employer. The Petitioner's counsel represented at the opening of the hearing that the Petitioner seeks a self-determination election to have the petitioned-for unit of employees added to the exiting unit as described in the Agreement. In the context of seeking a self-determination election, neither party asserts that the Agreement is a bar to the instant petition. The parties stipulated that the Employer declines to recognize the Petitioner as the collective-bargaining representative of the petitioned-for employees.

5. The parties have stipulated that for the purpose of a conducting a self-determination election in this matter, the following unit is an appropriate unit for collective bargaining purposes: All full-time and regular part-time employees employed by the Employer to install, operate, and remove all theatrical equipment and audio visual equipment, including technicians performing warehouse work; excluding all sales representatives, office clerical employees, guards and supervisors as defined in the Act. This stipulated unit description modifies the unit described in the parties' current collective-bargaining agreement to the extent that it includes employees who install, operate and remove audio visual equipment. Basically, the Petitioner seeks to represent the craft/technician employees who perform the above-described work in the field as well as the technicians who perform warehouse work at the Employer's facility. The stipulated unit does not include salespersons; employees who perform warehouse work in connection with filling walk-in or telephonic customer orders or rentals; or office clericals.

The record reflects confusion between the parties over the composition of the unit under the current Agreement. As indicated above, the custom and practice of the Employer has been to apply the terms of their various collective-bargaining agreements, including the Agreement, only to those employees dispatched by the Petitioner at the Employer's request. The testimony of the witnesses at the hearing is to the effect that in the calendar year preceding the hearing, the Petitioner dispatched approximately 50 employees to work for the Employer. However, the Petitioner asserts that the current unit under the Agreement is comprised of at least four employees (i.e., Michael Brown, Daniel Ramos, Daniel Williamson and Marcial Rojas) whom it contends are regular employees of the Employer who perform the work described in the Agreement but whom the Employer has not treated as covered by the Agreement. As indicated

above, the parties have stipulated that eleven named employees should be included in the unit. Their stipulation includes the names of the four employees whom the Petitioner contends should have been treated as covered by the Agreement, for purposes of conducting a self-determination election.

Although not raised by the parties, the first issue that must be addressed is whether a self-determination election is appropriate in the circumstances presented herein i.e., where the collective-bargaining agreement covering the unit to which the petitioned-for employees would be added has historically been applied only to employees dispatched through the Petitioner and whom the parties have termed "casual" employees. Thus, the identity of the employees in the existing unit is disputed by the parties. Moreover, by their stipulation, the parties have agreed that the petitioned-for unit would not be co extensive with the contractual unit but, in addition, would include employees who install, operate or remove audio visual equipment.

Secondly, the parties dispute the unit placement of a number of individual employees. Specifically, the Petitioner contends that Donald Eisenhauer lacks a community of interest with employees in the petitioned-for unit because he works primarily in the office as a sales employee; that Christina Roberts lacks a community of interest with the petitioned-for employees because she performs primarily clerical or administrative-type work; and that Robert Moore is a supervisor under the Act. The Petitioner further contends that on-call employees Trevor Guthrie and Scott Tupper should be included in the unit as regular part-time employees and that the eligibility standard to be applied for on-call employees in the instant case is whether they have worked at least two pay periods in the last year, or alternatively, in the last quarter.

Contrary to the Petitioner, the Employer asserts that Robert Moore is not a statutory supervisor and should be included in the unit. With regard to Roberts and Eisenhauer, the

Employer asserts that they are dual-function employees who spend part of their time performing bargaining unit work and therefore, have a sufficient community of interest in the conditions of employment of the unit to warrant their inclusion in the unit. With regard to Guthrie and Tupper, the Employer asserts that they should be excluded from the list of eligible voters because they do not meet the Board's criteria for eligibility to participate in the election, i.e. they will not have been employed during the payroll period immediately preceding the date of the direction of election, they will not have worked 15 days in the calendar quarter immediately preceding the direction of election, and they will not be employed at the time of the election.

Stipulations. The parties stipulated, and I find, that the following eleven employees are properly included in the unit: Michael Brown, Daniel Ramos, Marcial Rojas, Daniel Williamson, Vincent Bequiet, Zachary Molik, Maria Molina Mendoza, Jesus Mendoza, Moran Tomesella Brooks, Ryan Fitt and Paul Hoyle.

The parties further stipulated, and I find, that Christina Roberts and Donald Eisenhauer do not have the authority to hire, fire, or discipline employees and that they are not supervisors under the Act. The parties further stipulated, and I find, that Donald Eisenhauer and Robert Moore do not perform managerial functions and are not managerial employees under the Act.

The Employer's Operation. The Employer performs a variety of services for its clients, including providing multi-media equipment to a group of regular clients that include wineries and hotels for putting on seminars, sales meetings, auctions, or other special events. The Employer also handles the production of specific events for clients; the rental of equipment such as public address systems; the resale of items such as color media, gaffer's tape, special light bulbs, etc; and the sale of equipment on a special order basis. Ruth Anne Anderson is the Employer's Chief Financial Officer and Acting Chief Executive Officer. The Employer's Chief

Executive Officer, Russ Mitchell, was on six month medical leave of absence at the time of the hearing. The Employer's Chief Operating is Mark Ianziti. All of the Employer's regular employees report to Ianziti, who in turn, reports to Anderson.

The Employer's Agreement With the Petitioner. As indicated above, the Employer and the Petitioner have been party to a series of collective-bargaining agreements since 1993, and the current Agreement is effective until February 28, 2003. When the Employer and the Petitioner first entered into a collective-bargaining relationship, the Employer's CEO Russ Mitchell was a member of the Petitioner. However, for the past several years, the Employer's custom and practice has been to apply the terms of each collective-bargaining agreement only to on-call employees dispatched through the Petitioner to perform craft work that the Agreement defines as involving, "the installation/operation/removal of all theatrical equipment to be used for the purpose of entertainment." The terms of the Agreement have not been applied to the Employer's regular employees who perform sales, warehouse and other office work. As indicated above, during the past year, the Employer has hired at least 50 employees through the Petitioner pursuant to the terms of the Agreement. Most of these dispatch calls were for one or two days of work and many of the individuals dispatched were requested by name by the Employer. The record contains no payroll or other documentary evidence to show how many times the dispatched employees worked for the Employer, nor the number of hours or pay periods they worked. Former Operations Manager and Vice President Douglas Mitchell, who is the son of CEO Russ Douglas Mitchell and the nephew of Acting CEO Ruth Anderson, testified that only about 5 to 10% of the 50 employees dispatched by the Petitioner over the year preceding the hearing had worked for the Employer during as many as two pay periods in the preceding year.

The record reflects that the Petitioner historically has represented technicians who work as stagehands on productions involving both theatrical and audio visual equipment. The Petitioner has not historically represented clerical employees or other office staff or sales representatives which have been excluded from the unit stipulated to by the parties.

Donald Eisenhauer. Donald Eisenhauer has been employed by the Employer for approximately two and a half years. The record reflects that he spends approximately 90 to 95% of his time in the office. Fifty percent of his time is devoted to sales work and about 20% of his time is devoted to pulling equipment for customers for special purchase orders and rentals. Eisenhauer spends about 5% of his time pulling equipment for shows; 5% loading equipment; less than 5% of his work time installing or removing equipment at shows; and no time operating equipment or driving in connection with shows. Former Operations Manager Mitchell testified that Eisenhauer had worked on the installation and removal of equipment only on an emergency basis when someone did not show up for work, or when he wanted to earn extra pay and that he had only worked on about 5 to 10 shows for about 20 to 40 hours during the year preceding the hearing.

Eisenhauer's duties also include ordering supplies and equipment from other companies, such as generators, lease vehicles, etc. In addition, he performs inventory work and ensures that the Employer's stock is kept up to date. He also ensures that staff in the office receive copies of all work orders to pull stock from the warehouse and, occasionally, when the Employer is short-handed, he pulls orders from the warehouse. Eisenhauer reports to Chief Operating Officer Ianziti as do all of the other employees stipulated to be included in the unit. He earns $10 an hour and is eligible for the same benefits as are other unit employees. The other employees stipulated to be included in the unit earn between $7.50 and $15 an hour. There is no showing

that Eisenhauer receives any special privileges or benefits that are not received by other unit employees.

Operations Coordinator Christina Roberts. The record reflects that Operations Coordinator Christina Roberts began working for the Employer on February 1, 2000. Roberts spends about 50% of her work time performing office clerical work including working on timecards and payroll, taking orders from clients; scheduling technicians; keeping a calendar of events; and ensuring that employees are where they are supposed to be and that jobs are getting done. About 30% of Roberts' worktime is spent performing warehouse work, which includes pulling equipment for rental customers and for audio visual jobs and loading such equipment. About 5% of her work time is spent installing equipment and about 5% is spent removing equipment from jobsites. She spends no work time operating equipment at jobsites. Roberts reports to Ianziti. She earns $15 an hour and is eligible for the same benefits as are other employees.

Robert Moore. Robert Moore is employed full-time by the Employer as a designer, production organizer and head technician. He has been employed in various capacities by the Employer for the past 15 years. Moore works primarily on the single-event production side of the Employer's business but occasionally helps out with regard to ongoing audio visual clients. His responsibilities include making a list of the equipment needed for production events; deciding on the number of employees needed on a crew to assist him on a job; and estimating the amount of time required to install and remove equipment. Moore frequently functions as the Employer's head technician on a job. He physically helps to unload, install, operate and remove the equipment at the jobsite; and directs the work of the other crew members. Crews are generally comprised of between one and six persons. According to Anderson, other employees

have also directed crews on site, including Marcial Rojas and Jesus Mendoza, who are stipulated to be included in the unit by the parties. The record does not disclose how much of Moore's work time is spent actually performing hands-on technical work or how much time is spent directing other employees..

Acting CEO Anderson testified that she has never told Moore that he possesses any authority with regard to personnel matters involving other employees and the record does not reflect whether COO Mark Ianziti or any other manager has ever told Moore that he possesses 4authority in this regard.

According to Anderson, Moore does not do formal evaluations of employees but does respond to informal questions from the Employer regarding how employees are doing on the job. He has kept the timesheets for employees working at jobsites. Daniel Williamson, whom the parties stipulated should be included in the unit, has also kept track of employee timesheets for the Employer. Time off for employees must be approved by Mark Ianziti and overtime is generally determined by Ianziti or by CEO/CFO Ruth Anderson. According to Ianziti, overtime is generally determined by Anderson or Ianziti in production meetings the day prior to the overtime being worked. Anderson and Ianziti also decide which employees will stay to work the overtime. However, Anderson testified that Moore possesses the authority to order overtime should the need arise while he is on a job and can decide which employees will stay and work the overtime. The record does not disclose any specific instances when this has occurred nor does it disclose how frequently it has occurred.

Although Moore does not formally interview job applicants, the record reflects that Moore recommended the hire of high school students Moran Tomesella Brooks, Paul Hoyle and Zachary Molik and the Employer hired these individuals. The record does not reflect if any

independent evaluation was made of these persons prior to their hire. Anderson testified that with regard to these recommendations, Moore "recommended in the sense that he says I know someone that I think would be good, in the same way that Marcial [Rojas] has said I know someone that I think would be good." Rojas is stipulated by the parties to be included in the unit.

Anderson testified that Moore does not have authority to terminate or discipline employees and would have to seek the approval of Anderson to do so. According to Anderson, Moore cannot issue written reprimands or give oral warnings without such approval. Anderson testified that if Moore recommended that an employee be terminated, she would conduct her own independent investigation before terminating the employee. According to Anderson, Moore has authority to request that an employee be taken off his crew if he is not satisfied with their performance or because of problems with the employee. Anderson testified that in such circumstances, she would ask Moore the reason why he wants the person removed and if the reason makes sense the person will be transferred to do other work. The record does not contain evidence regarding any specific occasion where this has occurred.

Trevor Guthrie and Scott Tupper. The record discloses that Trevor Guthrie and Scott Tupper perform work that is primarily within the terms of the petitioned-for unit, namely the installation, operation and removal all theatrical equipment and audio visual equipment. Acting CEO Anderson testified that Guthrie previously worked for the Employer and by his choice left his employment. He has since, on occasion, worked for the Employer on an on call basis. At the time of the hearing, Guthrie was not on the Employer's payroll. Anderson testified that Tupper had worked for the Employer on an on call basis and that the last time he worked for the Employer was during the weekend of March 24, 2000. Tupper was not on the payroll at the time

of the hearing. Anderson testified that she believed that the most recent time prior to March 24, 2000, that Tupper worked was in January 2000, when he did some inventory work for the Employer. According to Anderson, both Guthrie and Tupper had been employed for more than two pay periods in the year preceding the hearing. Anderson testified that she was uncertain whether they had worked in excess of five pay periods without reviewing the payroll records. The record does not contain payroll records or other documentation to show the number of hours worked by Guthrie and Trevor during the past year. Anderson testified that to her knowledge no one in management had told Guthrie or Tupper the last time they worked whether they could expect to be reemployed by the Employer. However, she further testified that it would probably have been Ianziti's "position to state that or not, and I can't speak for him." Ianziti, Guthrie and Tupper did not testify at the hearing. Anderson testified that Guthrie and Tupper were not hired through the Petitioner.

Former Operations Manager Mitchell testified that he called Guthrie to work for the Employer on a number of occasions during about 10 payroll periods from June through early September, 1999. According to Mitchell, Guthrie worked about 250 to 400 hours during this period. Mitchell testified that Guthrie typically worked on a couple of busy days during a week and would work between 20 to 40 hours during those days. He testified that Guthrie had not been employed by the Employer since approximately early September, 1999.

Mitchell testified that Tupper worked at least ten payroll periods over the past calendar year and has worked twice in 2000: once in January when he worked two or three days for six to eight hours a day; and on March 25, when he worked for about ten hours.

Analysis- The Self-Determination Election Issue. As indicated above, the parties stipulated to a unit comprised of 14 named individuals and have raised issues with respect to

whether 5 individuals are eligible to vote in a self-determination type election. The parties have an existing collective-bargaining agreement covering a unit comprised of "stagehand employees," engaged in "the installation/operation/removal of all theatrical equipment to be used for the purpose of entertainment." Although this agreement does not expire until February 28, 2003, no party contends that it is a bar to conducting a self-determination election in this case.

As stated by the Board in *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990):

> A self-determination election is a proper method by which a union may add unrepresented employees to the contractual unit. In this regard, it is necessary to determine the extent to which the employees to be included share a community of interest with unit employees, as well as whether the employees to be added constitute an identifiable, distinct segment so as to constitute an appropriate voting group.

In the instant case, I find that a self-determination election is not an appropriate vehicle to determine the representational interests of the employees at issue. First, the stipulated unit is broader in scope than the unit covered by the parties' current collective-bargaining agreement. In this regard, I note that while the contractual unit is limited to employees involved in "the installation/operation/removal of all theatrical equipment to be used for the purpose of entertainment," the stipulated unit also includes employees engaged in the installation, operation and removal of audio visual equipment. Thus, by stipulating to an election in a broader unit, the parties have raised a question concerning representation regarding the unit. Further, the composition of the existing contractual unit is unclear. The parties agree that the Agreement has only been applied to cover employees dispatched by the Petitioner on a casual basis. However, a unit comprised of casual employees is not an appropriate unit where, as in the instant case, there has been no showing that the dispatched employees have worked a sufficient number of hours on

a regular basis under the formula applicable to determine the eligibility of such employees. Further, the parties have stipulated that the petitioned-for unit should include a number of employees whom the Petitioner asserts are performing bargaining unit work and should be covered under the terms of the current Agreement and there is no dispute that the Employer has not treated these employees as covered under the Agreement. In these circumstances, I find that a self-determination election is not appropriate in this case and that the only reasonable course is to direct an election among all of the employees who perform work as described in the stipulated unit and who are stipulated by name to be included in the unit, as well as those found to be eligible herein. See *New Berlin Grading, Inc*., 946 F.2d 527 (7th Cir. 1991); *D. V. Displays Corp.*, 134 NLRB 568 (1961). Accordingly, the election directed herein is not a self-determination election but a standard representational election to determine whether the Petitioner should be certified as the exclusive representative of the employees in the unit stipulated to by the parties and found appropriate herein.

David Eisenhauer. The Petitioner seeks the exclusion of Eisenhauer from the unit because he spends only minimal time performing unit work. The Employer seeks his inclusion in the unit. As indicated above, the parties have stipulated to a unit of "All full-time and regular part-time employees employed by the Employer to install, operate, and remove all theatrical equipment and audio visual equipment, including technicians performing warehouse work; excluding all sales representatives, office clerical employees, guards and supervisors as defined in the Act." The record establishes that Eisenhauer spends about 50% of his work time performing sales work, which is excluded work under the parties' stipulation herein. He spends another 20% of his time pulling orders for customer purchases or rentals, another category of work not covered by the unit. He spends 5% of his time pulling equipment for shows; 5%

loading such equipment; and only 5% of his work time installing or removing such equipment at jobsites. In these circumstances, it appears that Eisenhauer spends at most about 5% of his work time engaged in unit work.

Eisenhauer is a dual function employee, which is defined by the Board as an employee who performs more than one function for the same employer. Such employees may vote in an election if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have substantial interest in working conditions in the unit. See *Martin Enterprises, Inc.*, 325 NLRB No. 133 Slip Op. at p. 2 (April 30, 1998) and cases cited therein. See also *Oxford Chemicals, Inc.,* 286 NLRB 187 (1987); *Fleming Industries, Inc*. 282 NLRB 1030 fn. 1 (1987); and *Berea Publishing Co*., 140 NLRB 516 (1963). In applying this test, the Board has no "bright line" rule as to the amount of time required to be spent in performing unit work. Rather, the Board examines the facts in each case. *Id*. As the Board found in *Martin Enterprises, supra*, however, if unit work comprises less than 10% of the employee's work time, the employee will not be included in the unit. In *Oxford Chemicals*, 286 NLRB 187 (1987), the Board found that if unit work comprised 25% of an employee's work time on a regular basis, he would be included in the unit. As noted above, Eisenhauer spends at most about 15% of his work time performing unit work. Moreover, according to the testimony of former Operations Manager Mitchell, Eisenhauer works on the installation and removal of equipment only on an emergency basis when someone does not show up for work or when he wants extra pay. In these circumstances, I find that Eisenhauer does not perform a sufficient amount of bargaining unit work to be included in the unit. Accordingly, he shall be excluded from the unit.

Operations Coordinator Christina Roberts. The Petitioner asserts that Christina Roberts should be excluded from the unit on the basis that she spends an insufficient amount of time performing unit work to warrant her inclusion in the unit. Contrary to the Petitioner, the Employer asserts that Roberts should be included in the unit. The record establishes that like Eisenhauer, Roberts is also a dual function employee. She spends about 50% of her work time performing office clerical type work which is excluded under the parties' stipulation. About 30% of her time is spent performing warehouse work related to pulling equipment for customers who are renting or purchasing equipment. This work is not within the scope of the agreed upon unit. Roberts spends only about 10% of her time performing work covered within the terms of the parties' unit stipulation. Thus, as with Eisenhauer, I find that Roberts does not perform the same type of work performed by unit employees for a sufficient period of time to demonstrate that she has a substantial interest in working conditions in the unit. Accordingly, she will not be included in the unit.

Robert Moore. As indicated above, the Petitioner seeks to exclude Moore from the unit as a statutory supervisor and the Employer takes the contrary view.

The term "supervisor" is defined in Section 2(11) of the Act as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances. or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

"To meet this definition, a person needs to possess only one of the specific criteria listed, or the authority to effectively recommend, so long as the performance of that function is not routine but requires the use of independent judgment." *Nymed, Inc., d/b/a Ten Broeck Commons*,

320 NLRB 806, 809 (1996). Thus, in order to support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set forth in Section 2(11) of the Act and such authority must be exercised with independent judgment on behalf of the employer and not in a routine manner. *Bowne of Houston, Inc*., 280 NLRB 1222, 1223 (1986). An individual who exercises some "supervisory authority" only in a routine, clerical, perfunctory, or sporadic manner will not be found to be a supervisor. *Id*. Furthermore, secondary indicia alone, such as differences in pay, are insufficient to establish that an individual is a statutory supervisor. *Waterbed World*, 286 NLRB 425, 426 (1987).

As observed by the Board in *Providence Hospital*, 320 NLRB 717, 725 (1996), "In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with 'genuine management prerogatives', and 'straw bosses, lead men, and set-up men' who are protected by the Act even though they perform 'minor supervisory duties. *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 280-81 (1974)."

An employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will effect employees' job status. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989).

Whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility, and relationship to management. See *Phillips v. Kennedy,* 542 F.2d 52, 55 (8th Cir. 1976). Thus, the Act requires "evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority." *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971).

In determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 347 (1981). The burden of proving that an individual is a supervisor rests on the party alleging such status. *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

The record herein does not establish that Robert Moore is a statutory supervisor. There is no showing that Moore possesses any of the indicia of supervisory authority set forth in Section 2(11) of the Act. Thus, with regard to hiring, the record shows that Moore does not formally interview job applicants but has recommended the hire of three high school students who were hired by the Employer. The record does not disclose whether Anderson or Ianziti also interviewed these applicants prior to their being hired. Given the lack of evidence regarding the circumstances surrounding these hires, I do not find that the mere assertion that Moore recommended them and they were ultimately hired is sufficient to establish that he is a statutory supervisor on this basis.

Secondly, Moore has no independent authority to terminate or discipline employees and I do not find that his authority to request that an employee be removed from a crew constitutes disciplinary authority since such requests are reviewed by Ianziti or by Anderson and there is no showing that such requests have ever resulted in the employee being given a reprimand, being suspended or being terminated. Further, the record does not disclose specific instances where this has occurred nor the frequency with which it has occurred.

Moore does not evaluate employees and the fact that his Employer may sometimes informally ask him how employees are doing on the job does not establish statutory supervisory authority. Nor do I find that Moore's authority to determine the number of employees needed on

a crew; his direction of the crew at the jobsite; or his responsibility to keep timesheets on employees on his crew establishes his status as a statutory supervisor. Thus, the record does not establish that independent judgment is involved in determining the number of employees needed on a crew. Moore is plainly a senior employee with a high level of experience in the field and his ability to determine crew sizes would appear to flow from his own expertise. Similarly, the fact that Moore directs employees at a jobsite does not establish that he uses independent judgement in doing so. Accordingly, I do not find Moore to be a statutory supervisor based on his authority in this regard. Nor do I find that the fact that he may occasionally order overtime at a jobsite establishes his statutory supervisory authority. Thus, the record shows that whether overtime is worked and who works it is generally determined by Anderson or Ianziti and that Moore does not do so on a regular basis. Moreover, while the record does not disclose how frequently Moore orders overtime, Anderson's testimony suggests that it is sporadic or infrequent.

Finally, I note that Anderson testified that she had never informed Moore that he possesses any authority with respect to other employees and she did know whether he had ever been informed of such authority by anyone else in the Company. In sum, the record does not establish Moore's status as a statutory supervisor. He plainly spends most of his work time engaged in unit work. Accordingly, he will be included in the unit.

Trevor Guthrie and Scott Tupper. The Employer contends that Trevor Guthrie and Scott Tupper should be excluded from the unit because they are on call employees who do not regularly perform sufficient bargaining unit work to share a community of interest with the unit. In this regard, the Employer asserts that the traditional Board formula for determining the eligibility of on-call employees to be included in a bargaining unit should be used to determine

the eligibility of Guthrie and Tupper to vote in the election directed herein. Under this formula, to be eligible to vote in the election, the employees would have to be on the Employer's payroll at the date of the election as well as have worked 15 days during the calendar quarter immediately preceding the Decision. Contrary to the Employer, the Petitioner asserts that Guthrie and Tupper should participate in the election and that because of the erratic nature of the Employer's business, the Board should apply an eligibility formula requiring that the employees be deemed eligible to vote if they worked on-call more than two pay periods in the last year. Although the Petitioner cites *Luther Burbank Center for the Arts*, Case 20-RC-17581 in support of its contention in this regard, I note that this case involved a stipulated Election agreement and is not dispositive of the issue presented herein.

The Board has taken a flexible approach in devising various formulas suited to unique industries, where employees are often hired to help on a day-by-day basis or production-by-production basis, in order to "afford employees with a continuing interest in employment the optimum opportunity for meaningful representation." See *DIC Entertainment, LP*, 328 NLRB No. 86 Slip Op. (May 28, 1999), (employees eligible where they worked at least 15 working days for the Employer during the year prior to the direction of election or have been employed on at least two productions for a minimum of 5 working days during the 12 months preceding the direction of election) and cases cited therein. It is plain from the testimony in the record herein that application of the formula utilized by the Board in *DIC* would result in a finding that Guthrie and Tupper are eligible to participate in the election directed herein. Further, given the nature of the Employer's business, it appears that the application of the formula used in *DIC* would be appropriate in the instant case. As both Guthrie and Tupper worked a substantial number of hours over several pay periods during the summer of 1999, and Tupper also worked for the

Employer in January and March 2000, although his employment in January 2000 appears to have been for the purpose of performing inventory (non-unit) type work, they would be eligible to participate in the election under Board's eligibility formula in *DIC*. Thus, it appears that Guthrie and Tupper have each either worked on at least two productions for a minimum of five working days during the 12 months preceding this Decision or worked at least 15 days for the Employer during the 12 months preceding this Decision. Further, there is no evidence that the Employer ever terminated either employee or told them that they would not be called back to work in the future. Accordingly, Guthrie and Tupper are eligible to vote in the election directed herein.

Based on the foregoing, I find that the unit stipulated to by the parties is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act. Accordingly, an election shall be directed in the following unit:[2]

> All full-time and regular part-time employees employed by the Employer to install, operate, and remove all theatrical equipment and audio visual equipment, including technicians performing warehouse work; excluding all sales representatives, office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on

[2] In accordance with the stipulation of the parties and the findings set forth above, the following employees are eligible to participate in the election directed herein: Michael Brown, Daniel Ramos, Marcial Rojas, Daniel Williamson, Vincent Bequiet, Zachary Molik, Maria Molina Mendoza, Jesus Mendoza, Moran Tomesella Brooks, Ryan Fitt and Paul Hoyle, Trevor Guthrie and Scott Tupper.

vacation, or temporarily laid off. Also eligible to vote are employees who worked at least two productions for a total of 5 days over the one year period preceding this Decision or who worked at least 15 days during the year period preceding this Decision. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Theatrical Stage Employees Local 16, International Alliance of Theatrical Stage Employees, Moving Pictures Technicians, Artists and Allied Crafts of the United States and Canada**.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director of Region 20 who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359

(1994). In order to be timely filed, such list must be received in the Region 20 Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before June 1, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by June 8, 2000.

DATED at San Francisco, California, this 25th day of May, 2000.

/s/ Robert H. Miller
Robert H. Miller, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735

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